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Nos. 280, 281

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Supreme Court of the United States

OCTOBER TERM, 1953

PHILLIPS PETROLEUM COMPANY, *Petitioner*,

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF DETROIT, MICHIGAN; CITY OF KANSAS CITY, MISSOURI; CITY OF MILWAUKEE, a municipal corporation; COUNTY OF WAYNE, MICHIGAN; and THE FEDERAL POWER COMMISSION, *Respondents*.

STATE OF TEXAS AND THE RAILROAD COMMISSION OF TEXAS; CORPORATION COMMISSION OF OKLAHOMA; and STATE OF NEW MEXICO AND OIL CONSERVATION COMMISSION OF NEW MEXICO, *Petitioners*,

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF DETROIT, MICHIGAN; CITY OF KANSAS CITY, MISSOURI; CITY OF MILWAUKEE, WISCONSIN; COUNTY OF WAYNE, MICHIGAN; and THE FEDERAL POWER COMMISSION, *Respondents*.

On Petitions for Rehearing on Petitions for Writs of Certiorari to the Court of Appeals for the District of Columbia Circuit.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF

THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA
RUSSELL B. BROWN,
General Counsel
L. DAN JONES,
Asst. Gen. Counsel

INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA
WESLEY E. DISNEY,
Its Counsel

TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION
HAYDEN W. HEAD,
L. ALVIS VANDYGRIFF,
Its Counsel

PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION
GRADY HAZELWOOD,
Its Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come The Independent Petroleum Association of America, Independent Natural Gas Association of America, Texas Independent Producers and Royalty Owners Association, and Panhandle Producers and Royalty Owners Association, and respectfully move this Court, pursuant to

Rule 27, Paragraph 9 of the rules of this Court, for leave to file the accompanying brief in these cases as amici curiae. The interests of the organizations set forth above and their reasons for asking for leave to file a brief amici curiae are set forth below.

The Independent Petroleum Association of America is a corporation organized and existing under the laws of the State of Oklahoma. The membership of the Association consists of more than 11,000 individuals and corporations who are interested in various branches of the oil and gas industry. The Association's primary interest is in the local function of producing and gathering crude oil and natural gas. Some members produce dry natural gas. Many members of the Association produce gas associated with crude oil. The activity is a single one. It cannot be separated. Any matter affecting the production of gas inescapably affects the intermingled activity of crude oil production. Every oil and gas producing area of the United States is represented in the membership of the Association.

The Independent Natural Gas Association of America is a corporation organized and existing under the laws of the State of Delaware. The membership of the association is composed of approximately 1,900 members, including producers, royalty owners, transporters (interstate and intrastate), natural gas companies (under the Natural Gas Act) and distribution companies, located in forty-three different states including all natural gas producing states and most of the natural gas consuming states. The principal business objectives and purposes of the association, as set forth in its charter, are to promote and advance the welfare, progress and development of the natural gas industry in the United States. This Association participated in this proceeding as an interested party intervenor before the Federal Power Commission. Permission to file this brief has been requested of all parties. Several have declined such permission.

The Texas Independent Producers and Royalty Owners Association is an unincorporated association composed of

more than 4,500 members who are independent producers of, or royalty owners of, gas or oil under and produced from land lying in the State of Texas.

The Panhandle Producers and Royalty Owners Association is an association consisting of a large number of producers and royalty owners who are interested in the production of gas in the huge Panhandle Field of Texas.

Ambiguous court decisions concerning the jurisdiction of the Federal Power Commission under the Natural Gas Act with respect to the sales of natural gas in connection with production and gathering activities have caused uncertainty and confusion within the oil and gas industries for several years. The divided opinion below instead of clarifying the statute has compounded this uncertainty and confusion.

The movants, therefore, are vitally interested in the matters involved in these cases and clarification of the decision below for reasons more fully developed in the attached brief.

Respectfully submitted,

THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA
RUSSELL B. BROWN,
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Asst. Gen. Counsel

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BRIEF AMICI CURIAE OF THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, AND PANHANDLE PRODUCERS AND ROYALTY OWNERS ASSOCIATION

The Independent Petroleum Association of America, Independent Natural Gas Association of America, Texas Independent Producers and Royalty Owners Association,

and Panhandle Producers and Royalty Owners Association, as amici curiae, respectfully request that the Court grant a rehearing of its orders entered November 30, 1953, denying the petitions for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above entitled cases.

The amici curiae are associations whose members are intimately concerned with the business of natural gas in the United States. One is an association of producers and gatherers of oil and gas and land and royalty owners throughout this country. Another is an association of producers, transporters and distributors of natural gas in the United States. One has in its membership several thousand independent producers and royalty owners in the State of Texas. Two are associations whose members are interested in certain areas in Texas where large quantities of gas are produced. Through these associations there are represented here thousands of producers, gatherers, land and royalty owners, transporters and distributors of natural gas.

REASONS FOR GRANTING A REHEARING AND ISSUING THE WRIT

The petitions for certiorari in the above entitled causes disclose the kind of question which this Court has indicated by its rules and by its decisions is proper for it to consider. The Court of Appeals for the District of Columbia Circuit has decided an important question of federal law which has not been but should be settled by this Court. This is the first case to reach this Court raising the question of jurisdiction of the Federal Power Commission under the Natural Gas Act over field sales of natural gas in interstate commerce by a producer and gatherer who does not own or operate and is not affiliated with any company which owns or operates transmission pipelines. The question presented is of national importance as is evidenced by

the fact that the Federal Power Commission, through the Acting Solicitor General of the United States, and the states of Texas, Oklahoma and New Mexico have petitioned this Court for review.

In addition to the above stated reasons for granting a rehearing and issuing the writ, a further reason is the necessity for an authoritative decision by the Court on the question involved. No criteria are furnished by the opinion below whereby those engaged in the production or gathering of natural gas may schedule orderly operations or make commitments for the future with any reasonable assurance of their status with respect to federal regulation under the Natural Gas Act. Transporters and distributors are concerned that the uncertainties and confusion among producers and gatherers may adversely affect their ability to meet their obligations to the consuming public.

For many years the oil and gas producing industry has been in a state of confusion and doubt in respect to the authority of the Federal Power Commission to regulate field sales of gas by independent producers and gatherers incident to its production and gathering. The origin and the development of these doubts have been sufficiently related in other briefs in these causes. Widespread economic interests are involved. This state of confusion is detrimental to the interests of independent producers and gatherers and in fact to all branches of the natural gas industry as well as the consumers. It has long been hoped that an authoritative court decision would clarify these issues. To the contrary, the Court of Appeals decision here involved has intensified the confusion and uncertainty faced by independent producers and gatherers of gas. The independent producer and gatherer of gas is left without guidance.

Denial of certiorari by this Court indicates no approval or disapproval of the decision below (*Maryland* v. *Baltimore Radio Show*, 338 U.S. 912; *Agaston* v. *Penn.*, 340 U.S. 884; *Brown* v. *Allen*, 345 U.S. 946. The situation stands therefore precisely as if certiorari had not been applied for.

A decision by one Court of Appeals, even with the concurrence of all three judges, would be little assurance that the decision would be sustained by this Court. A decision by a divided Court, such as the one here, is all the more uncertain. Therefore, nothing has been settled and the confusion and doubt remain.

Dean Pound has stated:[1]

> "... The opinion of the court not only determines the law applicable to the case in hand and grounds the judgment in that case, but it has the wider function of furnishing a starting point for judicial reasoning in analogous cases both in the jurisdiction in which it is delivered and in other jurisdictions ..."

The decision of the Circuit Court has not fulfilled this function.

If it could be assumed that the decision of the Court of Appeals correctly interprets the Natural Gas Act, independent producers and gatherers are confused and uncertain in respect to the application of the decision to their operations. The Court's reasoning is obscure and it cannot be determined with certainty just which sales for resale in interstate commerce are subject to federal authority or whether Phillips' sales are subject because of special circumstances and if so what the controlling circumstances are.

The Court said that Phillips "sells the gas after the time and beyond the place at which production and gathering are complete and after processing has intervened." But where were production and gathering complete? It may be inferred they were complete at least by the time the gas entered the gasoline plant inasmuch as the Court said that processing intervened. Many questions remain unsettled which are perplexing to the independent producers and gatherers: Would the sales have been exempt from the Act if the gas had been delivered to an interstate pipe line

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[1] American Bar Association Journal, Sept., 1953, Vol. 39, page 795.

without processing? If "processing" is the test, then what types of processing is determinative? Was it the processing of the gas, or was it the flow of the gas from the exhaust of the plant "about 240 feet through a Phillips' pipe line to sales meters" which subjected sales to regulation? Or did gathering end, as some of the witnesses for the Federal Power Commission Staff contended, at a point in the field where the gas is first brought from the well where it is commingled with gas from one or more other wells? (R. 681-692) Are production and gathering complete when the the gas first enters "high pressure trunk lines"[2] even if

[2] The opinion of the Court in this case is the first time to our knowledge that any Court has ever used the term "high pressure trunk lines" in relation to gathering lines or lines which serve the function of collecting the gas to a central point for processing or for delivery to a pipe line. Certainly this Court has never used that expression in respect to anything except transmission lines in discussing the states' regulatory power over them. F.P.C. v. East Ohio Gas Co., 338 U.S. 464, 470. In that case this Court said:

> "For in decisions prior to enactment of the statute this Court had sharply distinguished between the two: *it had made it clear that the national commerce power alone covered the high-pressure trunk lines to the point where pressure was reduced and the gas entered local mains, while the state alone could regulate the gas after it entered those mains. (10) The legislative history shows that the attention of Congress was directly focused on the cases drawing this distinction.*" (Emphasis supplied)

In footnote (10) to that opinion the Supreme Court, after reviewing its decisions antedating the Natural Gas Act, concluded:

> *"Thus when the Natural Gas Act was passed this Court's decisions had already resulted in a sharp cleavage between local distribution facilities and high-pressure pipe lines serving those facilities."* (Emphasis supplied)

Gathering lines irrespective of their size or pressure were not high-pressure lines serving distribution facilities nor were they involved or mentioned in the cases above upon which "the attention of Congress was directly focused." The significant thing is the economic function performed by the lines, not the question of pressure. Compare *Panhandle Eastern Pipe Line Co.* v. *Public Service Company*, 332 U.S. 507, 513; *Mississippi* v. *Interstate Natural Gas Co.*, 284 U.S. 41.

those lines are still serving the function of bringing the gas to a gasoline plant or a transmission line in the field of production? If the decision of the Court of Appeals is to be construed to extend the high pressure trunk line doctrine to gathering lines, how are the independent producers and gatherers to know what constitutes high pressure and what constitutes trunk lines? Most gas from gas wells, as distinguished from gas from oil wells, is gathered under the natural pressure of the wells. Gas from oil wells, known as casing-head gas, is sometimes, but not always, compressed in order to make it flow through the gathering lines, but the artificial pressure is normally less than the natural pressure from gas wells. How to apply the high pressure trunk line doctrine to this type of situation would be most puzzling to producers and gatherers.

The statute itself says that it "shall not apply . . . to the production or gathering." The exemption is all inclusive. The physical activities of producing and gathering gas, as well as the economic activity, i.e., the sale of gas incident to its production and gathering, are outside the scope of the law. Although the opinion below recognized that sales of gas at the wellhead are not subject to regulation under the Natural Gas Act, the question still arises as to the extent of the exemption, i.e., that point in production and gathering operations or activities at which the jurisdiction of the Federal Power Commission under the Act attaches. While the function of "gathering" is exempt by the Act, the decision casts uncertainty upon what activities are properly to be included within the scope of "gathering" as the word is used in the Act. Likewise, the decision is not clear as to the effect of "processing" upon the jurisdictional status of sales. In the decision, emphasis is repeated to the effect that in this case the sale occurred *after* production and gathering had ceased and processing "intervened." What is the situation if some form or type of processing is performed during "gathering"? The decision does not provide the answer.

These and many other questions remain unanswered by the opinion of the Court of Appeals, and there is no consistent policy or doctrine expounded by that Court whereby these questions may be resolved.

The industry is, therefore, confounded with greater confusion and doubt than it was before the decision of the Court of Appeals. Only this Court can correct the situation. We urge this Court to do so.

Respectfully submitted,

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